STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 20, 2003
v	No. 235374 Kalkaska Circuit Court
JODIE JAMES LOWERY, Defendant-Appellant.	LC No. 01-002086-FH

Before: Saad, P.J., and Meter and Owens, JJ.

PER CURIAM.

Defendant appeals as of right from a jury trial conviction of second-degree criminal sexual conduct, MCL 750.520c(1)(a). The trial court sentenced defendant to three to fifteen years' imprisonment. We affirm.

I

Defendant contends that he was denied his constitutionally protected right "to be confronted with the witnesses against him." US Const, Am VI; Const 1963, art 1, § 20. During the minor victim's testimony, the trial court allowed a blackboard to be positioned so that she could not see the defendant when she testified.

In *People v Pesquera*, 244 Mich App 305, 309; 625 NW2d 407 (2001), we opined:

> "The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Maryland v Craig*, 497 US 836, 845; 110 S Ct 3157; 111 L Ed 2d 666 (1990). The right to confront one's accusers consists of four separate requirements: (1) a face-to-face meeting of the defendant and the witnesses against him at trial; (2) the witnesses should be competent to testify and their testimony is to be given under oath or affirmation, thereby impressing upon them the seriousness of the matter; (3) the witnesses are subject to cross-examination; and (4) the trier of fact is afforded the opportunity to observe the witnesses' demeanor.

In regard to the "face-to-face" requirement, the Supreme Court noted that a state's "'interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial . . . in the absence of face-to-face confrontation with the defendant.'" *Id.* at 310, quoting *Craig, supra* at 855. However, before using a special procedure that dispenses with the face-to-face requirement, the trial court must find that the child witness would be traumatized by the defendant's presence. *Pesquera, supra* at 310, quoting *Craig, supra* at 855-856. "Because the state's interest is particular to the individual child witness, no bright-line rule can be composed that can be applied each time the issue is raised." *Pesquera, supra* at 310.

Here, although the victim may not have been able to eloquently articulate that she was traumatized by defendant's presence, the record plainly established that she was unable to testify in defendant's presence. Thus, under these circumstances, we do not believe that the trial court's use of special procedures to permit her testimony violated defendant's constitutional rights. *Pesquera, supra* at 310.

Defendant correctly notes, however, that our Legislature has not specifically authorized the use of a blackboard as a "special procedure." Instead, MCL 600.2163a provides for the use of more extreme measures, such as permitting the witness to testify by way of closed-circuit television, MCL 600.2163a(16)(a), or "videorecorded deposition," MCL 600.2163a(18). However, we note that MCL 600.2163a(19) expressly provides that the statute "is in addition to other protections or procedures afforded to a witness by law or court rule." Accordingly, we are not persuaded that the trial court was prohibited by MCL 600.2163a from using a less-restrictive measure, such as a blackboard, before resorting to the more-restrictive measures authorized by the statute. *Pesquera, supra* at 310, quoting *Craig, supra* at 855-856. Here, the blackboard allowed the jury and defense counsel to view the victim's demeanor while testifying. The record also established that the blackboard only minimally impaired defendant's ability to communicate with defense counsel. Consequently, we reject defendant's contention of error.

II

Defendant also contends that he was deprived of his constitutional right to effective assistance of counsel. A successful claim of ineffective assistance of counsel requires a defendant to "show that counsel's performance was deficient and that there is a reasonable probability that, but for the deficiency, the factfinder would not have convicted the defendant." *People v Snider*, 239 Mich App 393, 423-424; 608 NW2d 502 (2000).

First, defendant contends that defense counsel was ineffective for failing to make an adequate effort to locate five defense witnesses. However, trial counsel explained during the *Ginther*[1] hearing that he attempted to contact each witness and that two of the witnesses agreed to testify, but failed to show up. Accordingly, we are not persuaded that trial counsel's efforts

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

were deficient. Moreover, the witnesses' testimony would only have added cumulative character testimony.[2] Consequently, it is unlikely that the absence of these witnesses had any impact on the outcome of the proceedings. *Snider, supra* at 423-424.

Second, defendant contends that trial counsel was deficient for failing to properly advise or inform him about the polygraph examination. Specifically, defendant contends that he was not advised that the statements he made during the polygraph examination would be admissible at trial. However, defendant signed a waiver form explaining that his statements would be admissible. Moreover, trial counsel testified that he did, in fact, explain to defendant that his statements would be admissible. The trial court found that trial counsel was a more credible witness. We generally defer to the trial court's superior ability to weigh the witnesses' credibility. *People v McElhaney*, 215 Mich App 269, 278; 545 NW2d 18 (1996). Resolving the credibility question in trial counsel's favor leads to a conclusion that trial counsel adequately informed defendant that his statements could be used at trial.[3] Therefore, defendant's contention that trial counsel's performance was deficient in this regard is without merit. *Snider, supra* at 423-424.

Third, defendant contends that trial counsel was deficient in handling the evidence relating to the polygraph examination. The purportedly objectionable statement was a police officer's explanation that a police interview policy was written by the Polygraph Unit Commander. Although the police officer was a polygraph examiner, his testimony did not otherwise reference the polygraph examination. Thus, the risk of the jury extrapolating that information to conclude that defendant took, and failed, a polygraph examination was minimal. In contrast, had trial counsel objected, emphasis would have been placed on the statement. Therefore, we reject defendant's contention that trial counsel was deficient for failing to object.[4] *Snider, supra* at 423-424.

Fourth, defendant contends that trial counsel was deficient for failing to object to a school social worker's testimony that, in her experience, it was not unusual for a child to wait three years before disclosing abuse. Defendant suggests that this was improper opinion testimony by a

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[2] Although defendant suggested that some of the witnesses may have been able to corroborate the "bad dream" defense, defendant conceded that trial counsel had already determined that the defense was too weak to pursue. Accordingly, trial counsel could not be deemed deficient for failing to locate these witnesses or present their testimony.

[3] We further reject defendant's broader contention that trial counsel was deficient for failing to properly prepare him for the polygraph examination.

[4] Although defendant argues at length about the inadmissibility of indirect and direct evidence of a polygraph examination, defendant cites no authority in support of his assertion that the polygraph examiner's testimony regarding defendant's statements—without mentioning the polygraph examination—should have been suppressed. Ordinarily, a party abandons an issue by failing to cite any supporting legal authority. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). Accordingly, we decline to conclude that trial counsel was somehow deficient for failing to take action to exclude the polygraph examiner's testimony relating to defendant's statements.

lay witness. However, defendant cites no authority establishing that the testimony was inadmissible. Therefore, this issue has also been abandoned. *Watson, supra* at 587.

Finally, defendant contends that trial counsel was deficient for failing to object to he victim's mother's testimony. However, the testimony was plainly admissible pursuant to MRE 803A. Trial counsel is not ineffective for failing to advocate a meritless position. *Snider, supra* at 425. Consequently, we reject defendant's contention of error. *Id.* at 423-424.

III

Defendant also contends that he was deprived of a fair trial because of several instances of prosecutorial misconduct. Generally, we review claims of prosecutorial misconduct "case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial." *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). Where the prosecutorial misconduct issue is preserved, we evaluate "the challenged conduct in context to determine if the defendant was denied a fair and impartial trial." *Id.* However, where, as here, "a defendant fails to object to an alleged prosecutorial impropriety, the issue is reviewed for plain error." *Id.* To avoid forfeiture of the issue, defendant must demonstrate a "plain error that affected his substantial rights, i.e., that affected the outcome of the proceedings." *Id.*

First, defendant contends that the prosecutor improperly elicited testimony about the polygraph examination. Again, the purportedly erroneous testimony was the police officer's testimony that a policy was "written by the Polygraph Unit Commander." There was no direct or indirect reference to defendant taking a polygraph examination. Accordingly, we are not persuaded that plain error occurred. *Aldrich, supra* at 110.

Second, defendant contends that the prosecutor elicited improper hearsay testimony from the victim's mother. As noted above, however, the victim's mother's testimony was admissible pursuant to MRE 803A. Therefore, no error occurred.

Third, defendant contends that the prosecutor improperly "vouched" for the victim's credibility. A prosecutor may not vouch for the credibility of a witness to the effect that he or she has some special knowledge that the witness is testifying truthfully. *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). However, he or she may otherwise argue that a prosecution witness is credible. *McElhaney, supra* at 284; *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Here, the statement does not suggest that the prosecutor had impermissible personal knowledge. Instead, the statement was a proper, and particularly innocuous, comment on the victim's credibility. Accordingly, we find no error.

Fourth, defendant contends that the prosecutor's rebuttal closing argument improperly shifted the burden of proof. Our review of the entire argument does not support defendant's contention that the prosecution deliberately attempted to shift the burden of proof. Instead, the argument appears to be a somewhat inarticulate comment on defendant's lack of credibility and an assertion that the jury should choose to disbelieve defense witness testimony. Moreover, even if we were to find the argument erroneous, the trial court instructed the jury that it was to follow the law as given by the court, not the attorneys. The trial court also instructed the jury that

defendant was presumed innocent and that it was the prosecution's burden to prove each element of the crime. Because juries are generally presumed to follow their instructions, *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), we are not persuaded that the error, if any, was outcome determinative. Consequently, we reject defendant's contention of prosecutorial misconduct. *Aldrich, supra* at 110.

Fifth, defendant contends that the prosecutor improperly denigrated defendant by stating that he had a "powerful motive to lie." However, a prosecutor may argue that a testifying defendant is not worthy of belief and need not argue inferences only in the blandest terms. *Launsburry, supra* at 361. Accordingly, we find no error.

Finally, defendant contends that the prosecutor improperly elicited testimony from a police officer regarding defendant's pre-arrest conduct and statements. Specifically, defendant contends that his "pre-arrest statements about being willing to attend an interview, turning himself in, and providing 'information that didn't check out' were statements more prejudicial than probative and violated Defendant-Appellant's right against self-incrimination." Initially, we note that defendant has not provided any authority in support of his assertion that the statements were more prejudicial than probative.[5] Regardless, we are not persuaded that the statements were inadmissible. Moreover, even if the statements were inadmissible, "prosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence." *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999). Consequently, we reject defendant's contention of error.

In summary, none of defendant's contentions of prosecutorial misconduct were both plainly erroneous and outcome determinative. *Aldrich, supra* at 110. Moreover, we note that the alleged instances of prosecutorial misconduct did not deprive defendant of a fair and impartial trial—whether considered separately or cumulatively. *Aldrich, supra* at 110. Thus, trial counsel's failure to object was not outcome determinative; therefore, defendant's contention that trial counsel's failure to object constituted ineffective assistance of counsel is also without merit.[6] *Snider, supra* at 423-424.

Affirmed.

/s/ Henry William Saad
/s/ Patrick M. Meter
/s/ Donald S. Owens

[5] Moreover, otherwise admissible evidence is only inadmissible where its probative value is *substantially* outweighed by the potential for prejudice. MRE 403.

[6] Defendant further contends that the cumulative effect of the purported errors deprived him of a fair trial. However, in light of our above rulings, this argument is plainly without merit.